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No. 84-1953

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

MARCON, LTD.,
Petitioner,

v.

HELENA RUBINSTEIN, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
MarCon Has Presented No Reason Justifying Supreme Court Review of the Decisions in C.A. 80-1051-A And Appeal 83-1639	2
There Is No Basis for Overturning the Decisions In C.A. 83-912-A and Appeal 84-2320	3
CONCLUSION	4

TABLE OF AUTHORITIES

	Page
CASES	
Graver Tank and Mfg Co. v. *Linde Air Products, Co.*, 339 U.S. 605 (1950)	3
Magnum Co. v. *Coty*, 262 U.S. 159 (1923)	4
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948)	3
RULES	
Supreme Court Rule 10.6	3
Fed. R. Civ. P. 52(a)	3

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OPINIONS BELOW

Respondent Helena Rubinstein (hereinafter "HR") does not dispute the characterization by Petitioner MarCon (hereinafter "MarCon") of the opinions below, beyond noting that the July 5, 1983 opinion of Judge Bryan of the District Court for the Eastern District of Virginia further indicated that, even if it was to be found that MarCon had demonstrated use of the trademark Silk prior to the registration of HR's marks, MarCon still had failed to demonstrate any likelihood of confusion. *Petition,* at A-17 to A-19.

JURISDICTION

HR does not dispute MarCon's statement of jurisdiction. HR has no parent, subsidiary or affiliated companies to be listed under Supreme Court Rule 28.1.

STATUTORY PROVISIONS INVOLVED

HR does not dispute MarCon's characterization of the statutory provisions, beyond noting that § 9-203 of the Uniform Commercial Code has absolutely nothing to do with this trademark infringement action.

STATEMENT OF THE CASE

MarCon's Statement of the Case is replete with misstatements and "facts" having no basis in the record. Examples include the unproven statement that infringement of the alleged trademark "Silk Face Powder" was set forth by MarCon (*Petition* at 3) and the baseless statement that a separate action (C.A. 83-912-A) was filed "upon recommendation of the court below" (*Petition* at 7-8).

SUMMARY OF THE ARGUMENT

MarCon's arguments in support of granting a writ of certiorari are illusory and find no support in the evidence presented to the district court. The Fourth Circuit quite properly found that the factual determinations of the district court were not erroneous.

ARGUMENT

MARCON HAS PRESENTED NO REASON JUSTIFYING SUPREME COURT REVIEW OF THE DECISIONS IN C.A. 80-1051-A AND APPEAL 83-1639

MarCon tried and failed to convince two district court judges in C.A. 80-1051-A that there was a likelihood of confusion between trademarks and product descriptions used by HR and MarCon's trademark. In fact, as a matter of law, MarCon failed to appreciate the distinctions between a trademark and a product description. District Court Judges Lewis and Bryan both held that the evidence presented by MarCon failed to carry the burden of proof in trademark infringement actions. The judges applied the standards of the Fourth Circuit Court of Appeals correctly, and were affirmed twice by the Fourth Circuit Court of Appeals.

MarCon's illusory "evidence", misstatements of the record, and unproven and unaccepted "facts" do not overcome the findings of the two district court judges, which were affirmed twice by the Fourth Circuit, that MarCon simply failed to meet its burden of proof. Fed. R. Civ. 52(a) requires that the findings of the district court are not to be overturned unless clearly erroneous. The Fourth Circuit followed this requirement completely. *See, United States* v. *United States Gypsum*, 333 U.S. 364 (1948) and *Graver Tank and Mfg Co.* v. *Linde Air Products Co.*, 339 U.S. 605 (1950). The courts below reviewed all of the evidence presented by MarCon in support of the "questions" raised in the Petition, and found the evidence wanting.

THERE IS NO BASIS FOR OVERTURNING THE DECISIONS IN C.A. 83-912-A AND APPEAL 84-2320

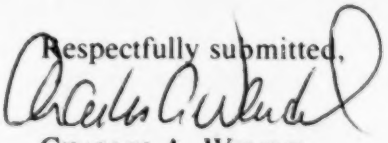
In C.A. 83-912-A, Judge Bryan found that MarCon's Rule 60(b) motion was untimely. The Fourth Circuit found this ruling was not an abuse of discretion. The merits of the Rule 60(b) motion are moot. MarCon has presented no reasons to compel review of the 4th Circuit's determination that Judge Bryan's refusal to hear the motion was not an abuse of discretion. Furthermore, Supreme Court Rule 10.6 allows combining several cases in a single petition for writ of certiorari only when identical or closely related questions are present. The instant petition does not meet this requirement.

CONCLUSION

MarCon has presented no issues worthy of the granting of certiorari. MarCon's "questions", which are largely illusory and based on unproven and unpresented "evidence", are merely the complaints of a dissatisfied losing party. Such complaints are unworthy of further consideration. *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

MarCon has proved that there is no basis in fact or in law for its cause of action. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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